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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

NO. [redacted] 91

THE WESTERN AND SOUTHERN LIFE INSURANCE COMPANY, Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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STATUTE

National Labor Relations Act, as amended, (61 Stat. 136, 29 U.S.C., §§ 151, et seq.)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

NO. .....

THE WESTERN AND SOUTHERN LIFE INSURANCE COMPANY, Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Western and Southern Life Insurance Company, petitioner, respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Third Circuit entered in the above-entitled case on March 4, 1964, by which that Court directed enforcement of the Board's Order.

OPINIONS BELOW

The Per Curiam Opinion of the Court of Appeals (Appendix p. 18, *infra*) is not yet officially reported. The majority Decision and Direction of Election of the Board in the representation proceedings (R. 3a-8a),[1] including the dissent of Members Rodgers and Leedom, is reported at 138 NLRB 538. The Board's Decision and Order in the unfair labor practice proceeding (R. 9a-10a), including the dissent of Members Rodgers and Leedom, is reported at 142 NLRB No. 5.

1 "R" references are to the Joint Appendix to the Briefs of the parties in the Court below.

Questions Presented.

JURISDICTION

The decree of the Court of Appeals (Appendix, p. 19, *infra*) was entered on March 24, 1964. The jurisdiction of this Court is invoked under 28 U.S.C., § 1254(1).

QUESTIONS PRESENTED

1. Has the National Labor Relations Board in adopting a new policy with respect to appropriate units for collective bargaining in the insurance industry reverted to its pre-1944 policy of regarding the extent of organization as controlling, in violation of Section 9(c)(5) of the National Labor Relations Act, as amended?

2. Where the National Labor Relations Board in a series of unit determinations in the insurance industry reaches inconsistent and conflicting conclusions on the same or similar facts, does this constitute an abuse of the discretion entrusted to the Board?

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., §§ 151, *et seq.*) are as follows:

"SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

* * * * *

"SEC. 8. (a) It shall be an unfair labor practice for an employer —

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * * *

"SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the pur-

poses of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: * * *

(c) * * * (5) In determining whether a unit is appropriate for the purposes specified in subsection (b) the extent to which the employees have organized shall not be controlling.

* * * * *

"SEC. 10. (c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *"

STATEMENT OF THE CASE

This is one of a series of cases in which the National Labor Relations Board has found as appropriate various combinations of sales offices of insurance companies. The one consistent feature of all the cases is that whatever unit or combination of sales offices the union sought has inevitably been found appropriate by the Board.

In 1961 the Board in *Quaker City Life Insurance Co.*, 134 NLRB 960 by a three-to-two majority abandoned its consistent policy of some seventeen years standing that a statewide unit of insurance agents was the smallest unit appropriate for collective bargaining in this industry. A flood of cases, of which the instant case is one, followed.

Based upon analysis of the decisions, the Board's new policy seems to be that regardless of the circumstances each sales office or "district office" of an insurance company is inherently or *per se* an appropriate unit, and that any one or any combination of offices is an appropriate unit, with the combination depending entirely upon the union's desires.

The Western and Southern Life Insurance Company, your petitioner, is an Ohio corporation with its home office in Cincinnati. It is engaged in the sale and servicing of life insurance policies, both ordinary and debit, and also health and accident insurance. (R. 23a-26a).

The Company has offices located in twenty-three states. For administrative purposes, the Company is divided into seven regions and fourteen divisions, made up at the time of the hearing of some 236 district offices plus some sixty-nine detached offices.

The Company's operations are highly standardized and centralized. (R. 5a).

The Union in the instant case filed separate petitions for each of two of the five district offices located in the metropolitan Pittsburgh, Pennsylvania, area. These are but five of the fifteen district offices and six detached offices which make up Division E of the Company. All of these offices are located in Pennsylvania except for one detached office in Wilmington, Delaware. (R. 4a, 31a, 70a, 91a).

At the bottom of the structure of each Division are the debit agents. Over the agents is an Associate Sales Manager. This is known as the "staff"—i.e., the Associate Sales Manager and the six or seven debit agents under him. Over the Associate Sales Manager is the District Sales Manager of the District. Over the District Sales Managers of the various Districts in the Division is the Superintendent of Agencies of the Division. (R. 27a-28a).

A Division is the administrative division and the principal operating unit of the petitioner. The Superintendent of Agencies of a Division has complete charge of all activities relating to agency personnel, including employment activities. The Superintendent in Division E exercises more latitude and a great deal more control than do the superintendents in the Divisions whose offices are located at the home office in Cincinnati, Ohio. (R. 28a, 32a).

The Union initially tried to organize the repondent's debit insurance agents in the Pittsburgh urbanized area. When it was unsuccessful in this attempt and could not obtain a sufficient showing of interest on this basis,[2] It

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2 (Offer of Proof, R. 111a-116a).

then filed a separate petition for the petitioner's McKeesport office at Case No. 6-RC-3060, and shortly thereafter it filed a separate petition for petitioner's Wilkinsburg (Pittsburgh East) District Office at Case No. 6-RC-3063. (R. 1a).

The above cases were consolidated for hearing, and the Board, Members Rodgers and Leedom dissenting, on September 12, 1962, issued its Decision and Direction of Election and directed *separate* elections for the debit insurance district agents at the petitioner's McKeesport and Wilkinsburg (Pittsburgh East) District Offices. (R. 1a, 3a-8a). This decision is reported at 138 NLRB 538.

After the Union was certified the petitioner refused to bargain with it, claiming the Board's unit determination was invalid and that the unit was not appropriate. In the ensuing unfair labor practice proceeding, the Board, with Members Rodgers and Leedom dissenting, found the petitioner in violation of Sections 8(a)(5) and (1) of the Act.[3] (R. 9a-21a). This decision is reported at 142 NLRB No. 5.

The United States Court of Appeals for the Third Circuit granted enforcement of the Board's Order in a Per Curiam Opinion (Appendix, p. 18, *infra*) entirely on the basis of its decision in *Metropolitan Life Insurance Company v. NLRB*, decided February 18, 1964. This *Metropolitan* decision (Appendix, pp. 20-39, *infra*) is not yet reported.

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3 The 8(a)(1) violation is purely derivative and of course it was necessary for the petitioner to commit an alleged technical violation of Section 8(a)(5) in order to test the validity of the unit. See *American Federation of Labor v. NLRB*, 308 U.S. 401, 411 (1940); *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U.S. 146, 154 (1941).

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals for the Third Circuit enforcing the Board's Order is in conflict with the decision of the Court of Appeals for the First Circuit in *Metropolitan Life Insurance Company v. NLRB,* .... F. 2d ...., (February 17, 1964), Case No. 6154, not yet officially reported. (Appendix, pp. 40-50, *infra*).

The decision of the Board, as enforced by the Court, together with the Board's decision in the other insurance industry cases, raises important questions with regard to the administration of the National Labor Relations Act which have not been but which should be reviewed by the Supreme Court.

1. The Decision Conflicts With That of Another Court of Appeals

In *Metropolitan Life Insurance Company v. NLRB, supra,* the Court of Appeals for the First Circuit denied the Board's Cross-Petition for Enforcement and held the insurance company was not guilty of an unfair labor practice where it refused to bargain with the union in order to test the appropriateness of a certified unit consisting of debit insurance agents in one District Office in a state. The Court found that the evidence showed that the Board unlawfully regarded the extent of union organization as controlling in making its unit determination. The Court found that inconsistent unit determinations by the Board in other insurance industry decisions, considered with the union policy of petitioning for a unit on a single district office basis if it failed to succeed in organizing on a broader basis, and the Board's consistent

practice of making unit determinations in accordance with the union request, showed that the Board regarded the extent of organization as controlling.

The decision of the First Circuit is in direct conflict with the decision of the Third Circuit Court of Appeals in the present case where in a Per Curiam Opinion (Appendix, p. 18, *infra*) the Court granted the Board's Petition for Enforcement. Here the Board had found the company guilty of an unfair labor practice when it refused to bargain with the union in order to test the appropriateness of separate units at each of the company's McKeesport and Pittsburgh East District Offices. The Per Curiam Opinion relied entirely upon *Metropolitan Life Insurance Company v. NLRB,* No. 14,390, decided by the Court of Appeals for the Third Circuit on February 18, 1964. (Appendix, pp. 20-39, *infra*).

Paradoxically, the Board's decision in the *Metropolitan* case in the First Circuit was based on the Board's decision that was before the Third Circuit, and, as stated, the Third Circuit relied upon its decision in the latter case as the basis for its Per Curiam Opinion in the present case.

In *NLRB v. Quaker City Life Insurance Company,* 319 F. 2d 690 (1963), the Fourth Circuit in a two-to-one decision upheld the Board's finding that a single District Office located at Alexandria, Virginia, was an appropriate unit. The dissenting Judge found that the Board had treated extent of organization as controlling.

2. The Board's Policy Violates Section 9(c)(5) of the Act.

Petitioner maintains that the evidence in this case when read in conjunction with the other cases in the long series of insurance cases under the new policy demonstrates unmistakeably that the Board has reverted to its prior policy of treating extent of organization as controlling in making unit determinations in the insurance industry.

If this be so, the Board's new policy violates the specific provisions of Section 9(c)(5) of the Act, and it cannot be allowed to stand.

The Board's policy change has resulted in establishment of dozens of fragmentary units in the insurance industry, and potentially may result in establishment of thousands. It is thus of broad national concern, and it is not limited in any sense to this petitioner or to any one geographical area.

In *Metropolitan Life Insurance Company,* 56 NLRB 1635 (1944) the Board adopted a policy of finding that any bargaining unit of insurance agents less than statewide or company-wide in scope was inappropriate.

In doing so, the Board abandoned its prior practice and policy, which was typically stated in *The Prudential Insurance Company of America,* 49 NLRB 450, 456 (1943) as follows:

> "* * * We have established less comprehensive units solely on the basis of the limited extent of self-organization among the employees affected."

Following its decision in *Metropolitan*, the Board for seventeen years thereafter found that units of insurance agents less than state-wide in scope were inappropriate.

When Congress enacted the Labor Management Relations Act, 1947, one of the specific restrictions upon the Board's discretion was treating extent of organization as controlling in making a unit determination, thus extending to all industry as a matter of law a policy the Board had previously found desirable in the insurance industry.

In *The Life Insurance Company of Virginia*, 123 NLRB 610 (1959) the Board decided to review its policy in the insurance industry. It invited and received briefs from unions and employers in the industry and heard oral argument.

In that particular case the union sought a single district office, saying it was an appropriate unit. The employer relied upon the policy adopted in *Metropolitan*.

The Board held that the single district office unit sought by the union was based upon extent of organization, and that it could not be appropriate in view of Section 9(c)(5) of the Act, and two members reaffirmed the *Metropolitan* rule. Member Fanning concurred specially, stating that he would not reaffirm the *Metropolitan* rule, but that he would find the single district office inappropriate using the ordinary tests for unit determination.

In *Quaker City Life Insurance Co.*, 134 NLRB 960 (1961), the Board by a three-to-two majority decided to abandon its *Metropolitan* rule, and held that the single district office sought by the union was an appropriate

unit. The employer refused to bargain in order to test the unit determination, and the Court of Appeals for the Fourth Circuit granted enforcement in this respect by a two-to-one vote in *NLRB v. Quaker City Life Insurance Co.*, 319 F. 2d 690 (1963).

Judge Boreman, in a strong dissenting opinion, observed:

> "This appears to me to be nothing less than a return to the heretofore unacceptable and outlawed practice of establishing provisional units which were admittedly based on the extent of organization and a circumvention of the express prohibition of the statute in the guise of a policy change."

The Board's decisions in the series of cases following the *Quaker City* decision strongly support Judge Boreman's observation in the view of the Court of Appeals for the First Circuit in its *Metropolitan* decision. On the other hand, the Court of Appeals for the Third Circuit in its *Metropolitan* decision said that on the record before it there was no evidence that the Board had treated extent of organization as controlling.

However, in the instant case the Court simply said its decision in *Metropolitan* was dispositive of the issues presented, without mentioning or reviewing the factual differences.

Of course, the Board is not so artless as to confess in its opinions that it is now treating extent of organization as controlling in the insurance industry,[4] but if as

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4 Furthermore, the Board will not permit introduction in the unfair labor practice case of evidence to support the allegation that the basis for its determination was extent of organization. Such evidence was offered

petitioner maintains the Board's decisions demonstrate that this is indeed its new policy, then that policy cannot be permitted to stand.

3. The Board's Application of Its Policy Constitutes an Abuse of Discretion.

This case presents the additional question of the Board's application of its rules in an inconsistent and arbitrary manner among employers in the same industry. The only consistency in the series of Board decisions following *Quaker City* is the approval by the Board of any unit sought by the union.

Granting that the Board has great latitude in determining units appropriate for bargaining, the question is whether or not the Board's discretion is in practical effect absolute, or whether it is subject to the rule of reason and fairness.

Prior decisions of the Supreme Court seem to have established that such a check exists.

NLRB v. Jones & Laughlin Steel Corp., 331 U.S. 416 (1947);

Office Employees International Union v. NLRB, 353 U.S. 313 (1957);

Hotel Employees v. Leedom, 358 U.S. 99 (1958).

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but rejected in the instant case. (R. 104a-116a). Refusal of such evidence resulted in denial of enforcement of the Board's order in *Singer Sewing Machine Company v. NLRB*, ... F. 2d .... (4th Cir., No. 8917, February 17, 1964), not yet officially reported.

The Courts of Appeal have also imposed such a check upon the Board's unreasonable exercise of its powers.

NLRB v. Pittsburgh Plate Glass Co., 270 F. 2d 167 (4th Cir., 1959), cert. den. 361 U.S. 943;

NLRB v. Convair Pomona, 286 F. 2d 691 (9th Cir., 1961);

NLRB v. Glen Raven Knitting Mills, Inc., 235 F. 2d 413 (4th Cir., 1956).

The remarks of Mr. Justice Douglas in his dissenting opinion in *New York, et al. v. United States, et al.*, 342 U.S. 882, 884 (1951) will bear repeating. He said:

> "Unless we make the requirements for administrative action strict and demanding, *expertise*, the strength of modern government, can become a monster which rules with no practical limits on its discretion. Absolute discretion, like corruption, marks the beginning of the end of liberty."

The inconsistent and arbitrary application by the Board of its new rules becomes apparent only if the entire series of decisions following *Quaker City* is examined. We are informed that certiorari will almost certainly be sought in the two *Metropolitan* cases, and possibly in a third now pending in the Sixth Circuit. Thus it may be anticipated that both the Board and the industry will seek a review of the entire problem, and it is indeed one of sufficient importance and nationwide concern to justify the Court's attention.

The question is not one of merely academic interest, for the requirement that this employer and others in the industry bargain meaningfully for wages, hours and

working conditions in some two or three hundred separate units in which wages, hours and working conditions have from time immemorial been identical, may well frustrate the very purposes the Act is intended to foster.

At this stage of the proceedings it is sufficient to merely recite the crazy quilt of combinations of district offices found to constitute "appropriate units" by the Board.

In *Metropolitan Life Insurance Co.*, 138 NLRB 512 (1962) the unit established consisted of nine district offices in the Cleveland, Ohio, metropolitan area. The employer refused to bargain. The Board ordered bargaining. 141 NLRB 96 (1963). The case is pending before the Sixth Circuit, Case No. 15366.

In *Metropolitan Life Insurance Co.*, 138 NLRB 565 (1962) the unit established consisted of two district offices in Wilmington, Delaware. The remaining district office in Delaware, 46 miles distant, was not included. The Board's order to bargain, 141 NLRB No. 37, was enforced by the Third Circuit Court of Appeals. (Appendix, pp. 20-39, *infra*).

In *Metropolitan Life Insurance Co.*, 138 NLRB 734 the unit established was the district office at Sioux City, Iowa, and detached offices at Fargo, North Dakota, and Sioux Falls, South Dakota, 284 and 120 miles distant, respectively.

In *Equitable Life Insurance Co.*, 138 NLRB 529 (1962) the unit established consisted of two district offices in Cleveland and a detached office at Lorain, Ohio, some 28 miles away.

In *Farmers Insurance Group*, 143 NLRB No. 15 (1963) the unit established was statewide.

In *Metropolitan Life Insurance Co.*, 144 NLRB No. 15 (1963), the unit was again limited to the unit sought by the Union, namely all district offices within the city limits of Chicago, Illinois. District offices outside the city limits but within the Chicago metropolitan area, which the Regional Director had added to the unit sought by the Union, were excluded by the Board.

In *Metropolitan Life Insurance Co.*, 1-RC-7024, the unit found appropriate was the single district office in Woonsocket, Rhode Island. The Board ordered the employer to bargain, 142 NLRB No. 60, and the Court of Appeals for the First Circuit refused enforcement in Case No. 6154. (Appendix, pp. 40-50, *infra*).

Finally, in the case giving rise to all the others, *Quaker City Life Insurance Co.*, 134 NLRB 960, the unit was the single district office at Alexandria, Virginia. In that case, the nearest district office was 100 miles away, and there was no administrative division of the company between the home office and the district office at Alexandria.

In the instant case there were five District Offices in metropolitan Pittsburgh, and a clearcut administrative subdivision covering the Pennsylvania District Offices.

Nevertheless, in the face of these facts, the Board found two of the District Offices in the Pittsburgh metropolitan area to be *separate* appropriate units, ignoring the existence of other contiguous District Offices in Pittsburgh and the existence of the clearcut, well defined administrative division covering the Pennsylvania offices.

This finding was completely inconsistent with the findings in the series of cases cited above; it was arbi-

trary and capricious and in disregard of the evidence on the record; and it can be supported only by the fact that the Union wanted only two of the five offices in metropolitan Pittsburgh and Division E, and wanted even those two offices to be separate units from each other. This decision of the Board, when read in conjunction with the others stating its new policy in this industry, represents an abuse of the Board's discretion.

CONCLUSION

For the reasons stated above, the Board's decision in this case raises important questions of national interest with regard to the administration of the National Labor Relations Act which have not been but which should be reviewed by the Supreme Court. The conflicting decisions in the First and Third Circuits confirm the need for review and clarification of these questions. This petition for a writ of certiorari should therefore be granted.

Respectfully submitted,

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Dated: May 7, 1964

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14,616

NATIONAL LABOR RELATIONS BOARD,
Petitioner

v.

THE WESTERN AND SOUTHERN LIFE INSURANCE COMPANY,
Respondent

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Argued February 17, 1964

Before KALODNER and HASTIE, *Circuit Judges* and KIRKPATRICK, *District Judge*

Opinion of the Court

(Filed March 4, 1964)

PER CURIAM.

Metropolitan Life Insurance Company v. National Labor Relations Board, F.2d (decided February 18, 1964) is dispositive of the issues presented.

The Order of the Board will be affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

WESTERN AND SOUTHERN LIFE INSURANCE COMPANY,
Respondent.

No. 14616

Decree

Before KALODNER and HASTIE, *Circuit Judges* and KIRKPATRICK, *District Judge*

THIS CAUSE came on to be heard upon the petition of the National Labor Relations Board for the enforcement of a certain order issued by it against Respondent on April 16, 1963. The Court heard argument of respective counsel on February 17, 1964, and has considered the briefs and transcript of record filed in this cause. On March 4, 1964, the Court, being fully advised in the premises, handed down its decision granting enforcement of the Board's order.

ON CONSIDERATION WHEREOF, it is ordered, adjudged and decreed by the United States Court of Appeals for the Third Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that Respondent, Western and Southern Life Insurance Company, its officers, agents, successors, and assigns, abide by and perform the directions of the Board in said order contained.

BY THE COURT

Dated:
March 24, 1964

KALODNER
Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14,390

METROPOLITAN LIFE INSURANCE COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON PETITION TO REVIEW AND SET ASIDE AND CROSS-PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Argued October 15, 1963
Before McLAUGHLIN, HASTIE and FOREMAN, *Circuit Judges.*

Opinion of the Court

(Filed February 18, 1964)

By McLAUGHLIN, *Circuit Judge.*

This case is before the court upon the petition of the Metropolitan Life Insurance Company (Metropolitan) to review and set aside an order of the National Labor Relations Board (Board) issued against Metropolitan on March 11, 1963, pursuant to Section 10(e) of the National Labor Relations Act, as amended, 29 U.S.C. § 151 et seq. (1958). In its answer the Board has requested that its order be enforced in full.

Metropolitan is a New York corporation, engaged in the sale and issuance of insurance policies throughout the United States and Canada. Its operations are highly centralized and the practices and procedures established at the New York home office govern the district offices, which are the basic operating units of the company. A superintendent of agencies oversees the district offices in his territory, while each district office is under the supervision of a manager. The district offices themselves are relatively independent of each other, except in so far as they are joined by the company into a territory. There is virtually no interchange of agents among the various district offices, and there is no business or social contact among agents except on the individual district office level.

Delaware is part of Metropolitan's Atlantic Coast Territory with three district offices. Two are in the Wilmington area, called Brandywine and Kirkwood, and the third is forty-six miles from Wilmington in Dover. These offices account for fifty-four regular (in the field) agents and four office account agents. Brandywine has eighteen, Kirkwood nineteen, and Dover seventeen.

It was within this organizational structure, the Insurance Workers' International Union, AFL-CIO (Union) sought to organize Metropolitan's insurance agents in Delaware. Apparently failing in its attempt to organize the agents of the three district offices, the Union petitioned the Board, pursuant to § 9(c) of the Act, requesting certification as bargaining representative of the agents at the two Wilmington district offices. The Board decided that the grouping of these two offices was an

appropriate unit for collective bargaining and directed an election to be held. The Metropolitan Life Insurance Company, 138 N.L.R.B. 565 (1962). The Union won and on October 15, 1962 the Board certified the Union as the representative.

Upon Metropolitan's refusal to bargain, the Board found that Metropolitan was guilty of an unfair labor practice within the meaning of Section 8(a)(5) and Section 8(a)(1) of the Act. Metropolitan Life Insurance Company, 141 N.L.R.B. No. 37 (1963). Metropolitan has admitted that it refused to bargain but has argued consistently below and here, that the grouping of the Brandywine and Kirkwood district offices, is not an appropriate unit, that the Board's unit determination is based on the Union's extent of organization contrary to § 9(c)(5) of the Act.

By virtue of Section 9(b) of the National Labor Relations Act (Wagner Act), Congress has given the Board the authority to determine units appropriate for purposes of collective bargaining. 29 U.S.C. 159(b) (1958), as amended. The Taft-Hartley Amendments have not altered this and the determination of an appropriate unit remains one left to the wide and informed discretion of the Board. Its decision, if not final, is rarely to be disturbed. Packard Motor Car Company v. N.L.R.B., 330 U.S. 485, 491 (1947); Texas Pipe Line Company v. N.L.R.B., 296 F.2d 208, 210 (5 Cir. 1961); Foreman & Clark, Inc. v N.L.R.B., 215 F.2d 396, 405 (9 Cir. 1954). See N.L.R.B. v. Pittsburgh Plate Glass Co., 270 F.2d 167, 173 (4 Cir. 1959); N.L.R.B. v. J. W. Rex Co., 243 F.2d 356, 359 (3 Cir. 1957); Westinghouse Electric Corp. v. N.L.R.B., 236 F.2d 939, 942 (3 Cir. 1956);

N.L.R.B. v. Botany Worsted Mills, 133 F.2d 876, 880 (3 Cir. 1943). However, the 1947 amendments, by the addition of certain sections and provisos to the Act, limited the discretion of the Board in determining appropriate units. This appeal is focused on Section 9(c)(5),[1] one such limiting section and the issue to be determined here is whether in the exercise of its said discretion, the Board went afoul of the Congressional mandate that in determining appropriate units, the extent to which the employees have organized shall not be controlling.

Early in its life, the Board had developed the so-called "Extent of organization" theory. This theory, quickly endorsed by the courts,[2] gave expression to the

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1 Section 9 "(a) * * *

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this sub-chapter, the unit appropriate for the purposes of collective bargaining, shall be the employer unit, craft unit, plant unit, or subdivision thereof: * * *

(c) (1) * * *

(2) * * *

(3 * * *

(4) * * *

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) of this section the extent to which the employees have organized shall not be controlling."

2 N.L.R.B. v. Hearst Publications, 322 U.S. 111, 134 (1944), citing Matter of Gulf Oil Co., 4 N.L.R.B. 133, 137 (1937); May Department Stores Co. v. N.L.R.B., 326 U.S. 376, 380 (1945) endorsing the view of the Board in 50 N.L.R.B., 669, 672 (1943); N.L.R.B. v. Norfolk Southern Bus Corp, 159 F.2d 516, 520 (4 Cir. 1947); N.L.R.B. v Botany Worsted Mills, 133 F.2d 876 (3 Cir. 1943), endorsing the appropriate unit in 27 N.L.R.B. 687, 690

view that it was desirable in the determination of an appropriate unit to render collective bargaining of employees an immediate or reasonably early possibility. The Board regarded this view as an obedient implementation of the command of the National Labor Relations Act that it seek to "insure to employees the full benefit of their right to self-organization and to collective bargaining and otherwise to effectuate the policies of the Act."[3] However, as the theory was brought to bear on Board determinations of appropriate units, it became clear that in certain instances, the extent of employee organization was given controlling weight. See Matter of Chase Brass & Copper Co., Inc., 4 N.L.R.B. 47, 51 (1937); New England Spun Silk Corp., 11 N.L.R.B. 852 (1939); Matter of Botany Worsted Mills, 27 N.L.R.B. 687 (1940), with

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(1940); See also Matter of R.C.A. Communications, Inc., 2 N.L.R.B. 1109, 1115 (1937); Gulf Oil Co, 4 N.L.R.B. 133 (1937); New England Spun Silk Corporation, et al, 11 N.L.R.B. 852, 855 (1939); Gastonia Weaving Co., Inc., 49 N.L.R.B. 342, 344 (1943); J. L. Hudson Co., 56 N.L.R.B. 406, 408 (1944); Armour and Co., 63 N.L.R.B. 1214, 1216-1217 (1945); Wells-Gardner & Co., 71 N.L.R.B. 176, 178 (1946).

3 Under the National Labor Relations Act before the 1947 amendments, 9(b) provided;

> "The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit or subdivision thereof."

The changed phraseology in Section 9(b) (see footnote 1) did not change its substance and the pre-1947 considerations are written into the Taft-Hartley version of the section. See 13 N.L.R.B. Ann. Rep. 36 (1948); National Tube Company, 76 N.L.R.B. 1199, 1203 (1948).

which Board determination we did not interfere. N.L.R.B. v. Botany Worsted Mills, 133 F.2d 876 (3 Cir. 1943); J. L. Hudson Co., 56 N.L.R.B. 406 (1944).

These decisions and others[4] attest to the strong, if not overwhelming reliance the Board, from time to time, placed on the factor of the union's extent of organization. It was this approach Congress sought to block.

Representative Fred A. Hartley, presenting the House Report on its bill to amend the National Labor Relations Act said in regard to what was to become 9(c)(5):

> "Section 9(e)(3) strikes at a practice of the Board by which it has set up as units appropriate for bargaining whatever group or groups the petitioning union has organized at the time. Sometimes, but not always, the Board pretends to find reasons other than the extent to which the employees have organized as ground for holding such units to be appropriate. [Matter of New England Spun Silk Co., 11 N.L.R.B. 852 (1939); Matter of Botany Worsted Mills, 27 N.L.R.B. 687 (1940).] While the Board may take into consideration the extent to which employees have organized, this evidence should have little weight, and as section 9(e)(3) provides, is not to be controlling." 1 Leg. Hist. 328.[5]

Senator Robert Taft, after the bill had passed the first time (the Senate and House later had to vote to override President Truman's veto), submitted a supple-

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4 See footnote 2.

5 Leg. Hist. denotes the two volume work Legislative History of the Labor Management Relations Act, 1947 (G.P.O. 1948).

mentary analysis of the Labor Bill as passed "in order to make clear the legislative intent." As to § 9(c)(5), Senator Taft said:

> "It overrules the 'extent of organization' theory sometimes used by the Board in determining appropriate units. Opponents of the bill have stated that it prevents the establishment of small operational units and effectively prevents organization of public utilities, insurance companies and other business whose operations are widespread. It is sufficient answer to say that the Board has evolved numerous tests to determine appropriate units, such as community of interest of employees involved, extent of common supervision, interchange of employees, geographical considerations, etc., any one of which may justify the finding of a small unit. The extent of organization theory has been used where all valid tests fail to give the union what it desires and represents a surrender by the Board of its duty to determine appropriate units. Its use has been particularly bad where another union comes in and organizes the remainder of the unit which results in the establishment of two inappropriate units." 2 Leg. Hist. 1625.

Simultaneous with the hearing and debates in Congress regarding the proposed amendments to the National Labor Relations Act, the Board was confronted with a series of representation petitions[6] of which Garden State

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6 Chadbourne Hosiery Mills, Inc., 74 N.L.R.B. 333 (1947); Jacoby-Bender, Inc., 74 N.L.R.B. 337 (1947); Asheboro Hosiery Mills, Inc., 74 N.L.R.B. 341 (1947); Waldensian Hosiery Mills, Inc., 74 N.L.R.B. 315 (1947); Hudson Hosiery Company, 74 N.L.R.B. 250 (1947). All of these cases were decided on the same day, June 20,

Hosiery Co., 74 N.L.R.B. 318 (1947) is most informative. For the first time the Board entered upon an extended discussion of the significance of the extent of organization theory in its consideration of an appropriate unit.

In Garden State Hosiery Co., 74 N.L.R.B. 318, 322-323 (1947), the Board said:

> "Extent of existing organization can never be the sole criterion, nor is it often the controlling one. The Board has always insisted on the coexistence of certain other facts that establish the feasibility of bargaining on the basis of the smaller unit. Additional objective factors must be present in order to rule out the possibility that the petitioning union might unrestrictedly manipulate the boundaries of the appropriate unit. Thus, not only must bargaining on a more comprehensive basis be improbable in the near future but, as a wholly separate matter, the unit sought must itself be homogeneous, identifiable and distinct. Indeed the Board has consistently refused to set apart as an appropriate unit any subdivision or group of employees the nature or situs of whose work is indistinguishable from that of other employees, or whose work is not functionally coherent and differentiated, despite the contention of a petitioning union to the contrary. Petitions which lack objective support are regularly dismissed, despite union's attempts to invoke the extent of organization theory."

1947, after the labor bill had passed the Senate and the House for the first time. On June 20, 1947, President Truman sent his message to Congress vetoing the Taft-Hartley Amendments.

See also Hudson Hosiery Company, 74 N.L.R.B. 250, 252 (1947). One such objective factor of which the Board speaks springs from the statute itself. The unit proposed must be an "employer unit, craft unit, plant unit, or subdivision thereof." 29 U.S.C. 159(b) (1958); Pittsburgh Plate Glass Co. v. N.L.R.B., 313 U.S. 146 (1941); N.L.R.B. v. Hearst Publications, 322 U.S. 111 (1944). Other factors born of the expertise of the Board and used to determine appropriate units have been: whether the proposed unit is homogeneous, identifiable, and distinct;[7] its previous history of bargaining;[8] whether there is a community of interest among the employees;[9] geographical prox-

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7 See Garden State Hosiery, 74 N.L.R.B., 318 (1947); Rothschild-Kaufman Co., Inc., 98 N.L.R.B., 353 (1952); N.L.R.B. v. Convair Pomona, 286 F.2d 691, 696 (9 Cir. 1961); Glen Raven Knitting Mills v. N.L.R.B., 235 F.2d 413 (4 Cir. 1956); N.L.R.B. v. Moss Amber Mfg. Co., 264 F.2d 107 (9 Cir. 1959); David Max & Co., 109 N.L.R.B. 1308 (1954). In determining "identity" or "distinct" character, whether there was an interchange of employees would be important.

8 See International Association of Tool Craftsmen v. Leedom, 276 F.2d 514 (D.C. Cir. 1960) where the court at p. 516 referred to this factor considered by the Board, because it is some evidence of a natural grouping.

9 Texas Pipe Line Company v. N.L.R.B., 296 F.2d 208 (5 Cir. 1961); N.L.R.B. v. Armour & Co., 154 F.2d 570 (10 Cir. 1946); Foreman & Clark, Inc. v. N.L.R.B., 215 F.2d 396 (9 Cir. 1954): There, at p. 406, the court spoke of "a cohesive group, allied as to their bargaining interests by the similarity of their functions and working conditions"; 13 N.L.R.B. Ann. Rep. 35 (1948); said the Board in Montgomery Ward & Co., 114 N.L.R.B. 1155 (1955): In establishing and describing appropriate units, the Board "strives to give meaning and practical effect to the actual day-to-day relationships among employees. The Board's aim is best served by giving controlling

imity;[10] the relationship between the proposed unit and the organization of the employer's business;[11] and the similarity of jobs and functions.[12]

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effect to the community of interest existing among employees * * * ."

10 Texas Pipe Line Company v. N.L.R.B., 296 F.2d 208 (5 Cir. 1961); N.L.R.B. v. Kentucky Coal Co., 152 F.2d 198, 202 (6 Cir. 1945); N.L.R.B. v. Smythe, 212 F.2d 664 (5 Cir. 1954); N.L.R.B. v. Smith, 209 F.2d 905, 907 (9 Cir. 1954); N.L.R.B. v. Moss Amber Mfg. Co., 264 F.2d 107 (9 Cir. 1959); Great A. & P. Tea Company, 128 N.L.R.B. 342, 343-344 (1960); Jackson Jitney Jungle Stores, Inc., 115 N.L.R.B. 374, 375 (1956); B. G. Wholesale, Inc., 114 N.L.R.B. 1429, 1430-1431 (1955); Buitoni Foods, Inc., 111 N.L.R.B. 638, 639 (1955).

11 See Pittsburgh Plate Glass Co. v. N.L.R.B., 313 U.S. 146 (1941).

12 Texas Pipe Line Company v. N.L.R.B., 296 F.2d 208 (5 Cir. 1961); N.L.R.B. v. Smythe, 212 F.2d 664 (5 Cir. 1954). See generally: Mountain States Telephone & Telegraph Co. v. N.L.R.B., 310 F.2d 478 (10 Cir. 1962); 1 N.L.R.B. Ann. Rep. 112-20 (1936); Magruder, A Half-Century of Legal Influence Upon the Development of Collective Bargaining, 50 Harv. L. Rev. 1071, 1106 (1937); 12 N.L.R.B. Ann. Rep. 20-21 (1947); 11 N.L.R.B. Ann. Rep. 24 (1946); Pittsburgh Plate Glass Co. v. N.L.R.B., 313 U.S. 146, 153 (1941). See 27 Fordham L. Rev. 218, 220 (1958). Note also the test devised for determination of an appropriate employer unit; resolving the issue of whether two closely related businesses constitute an appropriate single bargaining unit: present unity of interest, common control, dependent operation, sameness of character of work and unity of labor relations betwen the separate entities involved. N.L.R.B. v. Gibraltar Industries, Inc., 307 F.2d 428 (4 Cir. 1962); N.L.R.B. v. Jones Sausage Co., 257 F.2d 878 (4 Cir. 1958); N.L.R.B. v. Williams, 195 F.2d 669 (4 Cir. 1952).

Applying these factors, the Board could determine any number of appropriate units, comprising a given set of employees.[13] However, the question before the Board will of necessity be whether the proposed unit is appropriate, and in making that decision, Congress has now said, "the extent to which the employees have organized shall not be controlling." With all this in mind, we believe the effect of 9(c)(5) is to require the Board to determine whether a unit is in and of itself appropriate, apart from the extent to which the employees are organized.[14] Whether the employees were controlled by the extent of their organization when they petitioned the Board is not

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13 The Board has said "There is nothing in the statute which requires that the unit for bargaining be the *only* appropriate unit, or *ultimate* unit, or the *most* appropriate unit; the Act requires only that the unit be 'appropriate'. It *must* be appropriate to ensure to employees, *in each case,* 'the fullest freedom in exercising the rights guaranteed by this Act.'" Morand Brothers Beverage Co., 91 N.L.R.B. 409, 418 (1950); see also Garden State Hosiery, 74 N.L.R.B., 318, 324 (1947); Mueller Brass Co. v. N.L.R.B., 180 F.2d 402 (D.C. Cir. 1950); N.L.R.B. v. Smith, 209 F.2d 905, 907 (9 Cir. 1954).

14 The extent of organization is not excluded as a factor. Section 9(c)(5) permits it to be a contributing, but not a controlling factor. However, while this is what the section says, what it effects is to require the Board to discover a unit's appropriateness, apart from the extent of employee organization. The Board may regard the extent to which the employees are organized as having inherent evidentiary value, in the same way as prior history of bargaining (see footnote 8), but this should not control its determination.

the issue. Rather, it is whether the Board in determining a unit's appropriateness was so controlled.[15]

The extent to which the Union failed to organize should not determine the appropriateness of the group it did organize. To hold, that because the Union failed to organize on a broader basis, the smaller unit petitioned for is inappropriate, would be to penalize the Union for failing in an attempt to organize, which right is fundamental to the Act. We are therefore, of the same mind as Member Fanning, who in his special concurrence in Life Insurance Company of Virginia, 123 N.L.R.B. 610, 614 (1959), said:

> "Labor organizations are in the business of organizing employees, and it is not fanciful to assume that they desire to organize all the employees they can, or at least, all employees in certain job classifications.

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15 In this we differ with the interpretation of 9(c)(5) in N.L.R.B. v. Glen Raven Knitting Mills, 235 F.2d 413 (4 Cir. 1956) and N.L.R.B. v. Morganton Full Fashioned Hosiery Co., 241 F.2d 913 (4 Cir. 1957). In Glen Raven there was evidence that the Union failed to organize on a broader basis and sought a smaller unit which it had successfully organized and which the Board approved as appropriate. The court overturned the Board. Its rationale as described in Morganton at p. 915 was: "Clearly the union was controlled by the extent of its organization, and when the Board, with full knowledge of the facts, gave its approval, it failed to observe the provisions of the statute, * * *." However, Judge Boreman in his dissent in N.L.R.B. v. Quaker City Life Insurance Co., 319 F.2d 690 (4 Cir. 1963) hinted that the majority approach in the Quaker City case was in effect overruling Glen Raven and Morganton.

"That the Board has heretofore given a reasonable interpretation to the extent of organization provision 9(c)(5) is evident in prior decisions where, for example, the Board has held that the fact that a labor organization may have unsuccessfully attempted to organize on a broader basis does not render the smaller unit sought inappropriate when the smaller unit is otherwise appropriate. (See Whittaker Controls Division of Telecomputing Corporation (Lynwood Plant), 122 N.L.R.B. 624 (1958); Berger Brothers Company, 116 N.L.R.B. 439 (1956))."

Our interpretation of 9(c)(5) is not in conflict with our decision in Westinghouse Electric Corp., 236 F.2d 939 (3 Cir. 1956) or the view of other circuits in Quaker City Life Insurance Company v. N.L.R.B., 319 F.2d 690 (4 Cir. 1963); Foreman & Clark, Inc. v. N.L.R.B., 215 F.2d 396 (9 Cir. 1954); N.L.R.B. v. Moss Amber Manufacturing Co., 264 F.2d 107 (9 Cir. 1959); Harris Langenberg Hat Co. v. N.L.R.B., 216 F.2d 146 (8 Cir. 1954); N.L.R.B. v. Smythe, 212 F.2d 664 (5 Cir. 1954), which proposes that the extent of organization may be a factor although not the controlling one, as long as other valid tests indicate the unit is appropriate. This view is also sensitive to the legislative purpose of 9(c)(5). Of the many factors employed by the Board in determining appropriate units, Congress limited only the extent of union organization. On the other hand, Senator Taft specifically referred to the others, some of which we enumerated above, which could be properly employed by the Board. See statement of Senator Taft, supra. Further, consistent with our holding here, is the Board's interpretation of 9(c)(5) which, while not binding on this court, is entitled to

weight. Since the amendment, the Board has looked to factors other than extent of organization in determining appropriate units.[16] See particularly Waldensian Hosiery Mills, Inc., 83 N.L.R.B. 742, 744 (1949) On course, the various factors and policies the Board will follow in determining appropriate units will depend in great part on the type of unit proposed, whether it be residual, departmental, single plant, multi-plant or multi-employer, and on the type of industry involved. But whatever the kind of unit, the extent to which the employees are organized cannot be controlling.

This review is also focused on the insurance industry and the organization of insurance agents regarding which, for many years, a special rule was promulgated by the Board. In 1944, the Board adopted the policy that it would avoid certifying bargaining units of insurance agents less than state or company-wide in scope. Metropolitan Life Insurance Co., 56 N.L.R.B. 1635 (1944). This policy has not apparently been tested by the courts since the Taft-Hartley Amendments. But see Prudential Life Insurance Co., 56 N.L.R.B., 1859 (1944) affirmed 154 F.2d 385 (6 Cir. 1946). In Metropolitan (1944), the Board said at p. 1639:

> "Organization among insurance agents is comparatively recent, but is steadily growing. The tendency of such organization is toward statewide units * * *.

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16 Life Insurance Co. of Virginia, 143 N.L.R.B. No. 128 (1963); Singer Sewing Machine Co., 140 N.L.R.B. 1061, 1064 (1963); Sav-on Drugs, Inc. 138 N.L.R.B. 1032, 1035 (1962); Transcontinental Bus System, Inc., 119 N.L.R.B. 1840, 1844 (1958); See also Berger Brothers Co., 116 N.L.R.B. 439, 441 (1956); J.I. Case Company, 87 N.L.R.B. 692 (1949).

> Thus, the rapid growth of union organization among insurance agents makes it clearly appear that provisional units less than state-wide in scope are, under ordinary circumstances, unnecessary to make collective bargaining reasonably possible for them, if they desire it. Accordingly, we are of the opinion that, in the absences of unusual circumstances, the practice of setting up units for insurance agents smaller than state-wide in scope should be avoided."

This thinking guided the Board's determinations for seventeen years until Quaker City Life Insurance Company, 134 N.L.R.B. 960 (1961).[17] In Quaker City, the Board, with two members dissenting, found appropriate a unit consisting of employees of a single district office. The Fourth Circuit upheld the decision of the Board. N.L.R.B. v. Quaker City Life Insurance Co., 319 F.2d 690 (4 Cir. 1963). The Board held, at page 962, that the Metropolitan rule was:

> "* * * adopted *solely* in anticipation of broader organization on a company-wide or state-wide basis, which at that time appeared imminent. As a practical matter, however, such state-wide or company-wide organization has not materialized, and the re-

17 See inter alia; John Hancock Mutual Life Insurance Company, 57 N.L.R.B. 700 (1944); Prudential Insurance Company of America, 61 N.L.R.B. 1289 (1945); Quaker City Life Insurance Company, 73 N.L.R.B. 177 (1947); Monumental Life Insurance Company, 75 N.L.R.B. 776 (1948); Home Beneficial Life Insurance Company, 89 N.L.R.B. 392 (1950); United Insurance Company, 108 N.L.R.B. 843 (1954); The Life Insurance Company of Virginia, 123 N.L.R.B. 610 (1959); but see Prudential Life Insurance Company, 56 N.L.R.B. 1859 (1944) affirmed 154 F.2d 385 (6 Cir. 1946).

> sult of the rule has been to arrest the organizational development of insurance agents to an extent certainly never contemplated by the Act, or for that matter, by the Board, that decided the Metropolitan Life case. There is no longer any rational basis for applying different rules of organization to the insurance industry, than are applied to other industries. The rule was adopted for the purpose of permitting organization on a state-wide or employer-wide basis, which did not develop as anticipated. Contrary to our dissenting colleagues, we regard this as a valid reason for changing the rule. Obviously, when the purpose for which a rule has been established fails, the rule should also fail. This is especially so with respect to a rule which unfairly prejudices the collective bargaining rights of employees. Accordingly, in the future, the Board's policy will be not to preclude the organization of insurance agents into units of less than employer-wide or state-wide scope, and we shall apply our normal unit principles to the cases as they arise.

Since Quaker City, pursuant to its new policy, the Board has found as appropriate: a unit composed of district offices in the Cleveland area: Metropolitan Life Insurance Company, 138 N.L.R.B. 512 (1962), Equitable Life Insurance Company, 138 N.L.R.B. 529 (1962); two individual units, one at the McKeesport, Pennsylvania, District office and another at the Wilkinsburg, Pennsylvania, District office: Western and Southern Life Insurance Company, 138 N.L.R.B. 538 (1962); a unit composed of employees at the Sioux City, Iowa, Sioux Falls, South Dakota, and Fargo, North Dakota, district offices because the offices were administratively controlled by the

Sioux City district office: Metropolitan Life Insurance Company, 138 N.L.R.B., 734 (1962); a unit comprising the employees of the Chicago district offices: Metropolitan Life Insurance Co., 144 N.L.R.B. No. 15 (1963); a unit composed of the employees in a single district office: Life Insurance Company of Virginia, 53 L.R.R.M., 1515 (1963); and it was pursuant to its new policy that, the Board in this case found that the employees of the two district offices in the Wilmington area constituted appropriate unit. Metropolitan Life Insurance Company, 138 N.L.R.B. 565 (1962).

First of all, there can be no question that it was within the authority of the Board to change its rule, if in so doing, it did not act arbitrarily and unreasonable or in violation of the Act. SEC v. Chenery Corp. 332 U.S. 194 (1946); N.L.R.B. v. National Container Corp., 211 F.2d 525 (2 Cir. 1954); Optical Workers' Union v. N.L.R.B., 227 F.2d 687 (5 Cir. 1955); N.L.R.B. v. Pittsburgh Plate Glass Co., 270 F.2d 167, 174 (4 Cir. 1959). Metropolitan, however, argues that the change in policy represented a return to the extent of organization theory of choosing appropriate units, in violation of 9(c)(5). Metropolitan misreads the Board's reasons in Quaker City for the change in policy. It was the Board's informed view that the 1944 Metropolitan rule "unfairly prejudiced the collective bargaining rights of employees." There is a vast difference between taking away an obstacle to wider union organization and collective bargaining which is the explicit legislative purpose and mandate of the Act, and determining appropriate units on the basis of employee organization. Conversely, however, [though the point is now moot and we do not decide it] the Metropolitan state-wide rule seemed itself

born of the extent of organization theory. Metropolitan Life Insurance Company, 56 N.L.R.B. 1635 (1944); Quaker City Life Insurance Company, 73 N.L.R.B. 177 (1947); Prudential Life Insurance Company, 61 N.L.R.B. 1289, 1292 (1945); Life Insurance Company of Virginia, 123 N.L.R.B. 610 (1959), see special concurring opinion of Member Fanning at p. 614.

The Board here decided on the entire record before it that "* * * all agents are subject to the same wage policies, employee benefits and working conditions. * * * There is virtually no interchange or transfer of agents among the various district offices and there is no business or social contact among the agents except on the individual district office level. There is no history of collective bargaining affecting the employees involved in the instant proceedings. * * * [T]he individual district office is in effect a separate administrative entity through which the Employer conducts its business operation, and therefore, is inherently appropriate for purposes of collective bargaining. * * * [T]his finding does not preclude the grouping of such offices where such grouping is justified by cogent geographic considerations." Metropolitan Life Insurance Company, 138 N.L.R.B. 565, 567 (1962). For these reasons, the Board concluded that the agents of Metropolitan in the two Wilmington districts were an appropriate unit for collective bargaining. We believe the Board's determination was within its informed discretion consonant with Section 9(b) and not in violation of 9(c)(5) of the Act. As we noted above, the Union may be controlled by the extent of its organization so long as the Board is not controlled, i.e., the certified appropriate unit must be in and of itself appropriate apart from the extent of employee organization. Metropolitan

has contended that a state-wide territorial or company-wide unit is the appropriate unit. The Board might so declare such a unit appropriate, for, as the Board has said, there may be several kinds of appropriate units involving a given group of employees. The question should be and is in this instance whether the proposed unit is appropriate, in deciding which the Board has applied, it appears, the same criteria as it has to other industries and retail establishments. See Life Insurance Company of Virginia, 123 N.L.R.B., 610, 614 (1959); Quaker City Life Insurance Company, 134 N.L.R.B., 960, 962 (1961). See Donnelly, New National Labor Relations Board Criteria for the Organization of Insurance Agents, 1962 Insurance Law Journal 175 (1962). The criteria or factors considered for a single district office unit and for a unit comprising several district offices will differ in the same way as they differ somewhat in single plant and multi-plant determinations.[18] Thus while a single district office may be an appropriate unit, a grouping of two may not be, in the same general area where there are three district offices. If the same reasons which form the basis for a grouping of two, also apply to a grouping of three, the grouping of two may be inappropriate, because either arbitrary or in violation of 9(c)(5). See N.L.R.B. v. Convair Pomona, 286 F.2d 691 (9 Cir. 1961). That kind of claim made by Metropolitan here is readily refuted. The grouping of the two district offices was

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18 For factors used to determine multi-plant units, see Continental Baking Company, 99 N.L.R.B. 777 (1952); Father & Son Shoe Stores, Inc., 117 N.L.R.B. 1479 (1957) cited in Life Insurance Co. of Virginia, 123 N.L.R.B. 610 (1959) special concurrence of Member Fanning at p. 614; 16 N.L.R.B. Ann. Rep. 98-102 (1951); 15 N.L.R.B. Ann. Rep. (1950).

founded in part on cogent geographical considerations. The third district office not included was forty-six miles from Wilmington.

On a petition for enforcement, where there is a claim of gerrymandering or of a violation of 9(c)(5), the court, inter alia, in its study of the record will have that specifically in mind. See dissent in Equitable Life Insurance Company, 138 N.L.R.B. 529 (1962); see also dissent in Garden State Hosiery, 74 N.L.R.B. 318, 326 (1947). We mention this because of the position taken by Metropolitan that the Board in this action and in others used simulated bases for its decisions which were in reality controlled by the union's extent of organization. Petitioner draws a long bow in that charge which is not borne out by the record. Our own close examination of the latter has satisfied us that the grounds upon which the Board rendered its determination are not unreasonable and are supported by substantial evidence on the whole case.

The petition for review will be denied. The order of the Board will be enforced. A proposed form of decree may be submitted.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

Decision of First Circuit Court of Appeals in Case of Metropolitan Life Insurance Company v. NLRB (Official Text)

United States Court of Appeals
For the First Circuit

No. 6154.

METROPOLITAN LIFE INSURANCE COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Petition to Review and Cross-Petition for Enforcement of an Order of The National Labor Relations Board.

Before Woodbury, Chief Judge, and Hartigan and Aldrich, Circuit Judges.

Burton A. Zorn, with whom Jeremiah W. Mahoney, George G. Gallantz, Marvin Dicker, Thomas F. Delaney, Lyne, Woodworth & Evarts and Proskauer, Rose, Goetz & Mendelsohn were on brief, for petitioner.

Warren M. Davison, Attorney, with whom Arnold Ordman, General Counsel, Dominick L. Manoli, Associate General Counsel, and Gladys Kessler, Attorney, were on brief, for respondent.

OPINION OF THE COURT.

February 17, 1964.

Woodbury, Chief Judge. On petition of Insurance Workers' International Union, AFL-CIO, the National Labor Relations Board in a proceeding under § 9(c) of the Act, 29 U.S.C. §159(c), certified the Union as the bargaining representative of all debit insurance agents, including all canvassing regular and office account agents, at Metropolitan Life Insurance Company's district office in Woonsocket, Rhode Island. The Company deliberately refused to bargain collectively with the Union in order to challenge the appropriateness of the employee unit certified by the Board. See American Federation of Labor v. NLRB, 308 U.S. 401, 411 (1940); Pittsburgh Plate Glass Co. v. NLRB, 313 U.S. 146, 154 (1941). The Company agrees with the Board's classifications of employees included and excluded. That is to say, the Company does not contend that the unit certified by the Board contains ineligible employees or employees whose interests are antagonistic. Its contention is that an employee unit consisting of the debit insurance agents working out of only its one Woonsocket district office is inappropriate. Its position is that the only appropriate unit would encompass either 1) all of its offices in the United States, or 2) all of its offices in its New England Territory (Maine, New Hampshire, Vermont, Massachusetts and Rhode Island), or 3) all of its offices in Rhode Island. Furthermore, it says that in determining that the debit insurance agents at only one of its eight district offices in Rhode Island constituted an appropriate unit for collective bargaining, the Board treated as controlling the extent to which the Union had so far or-

ganized its employees in Rhode Island in clear violation of § 9(c)(5) added to the National Labor Relations Act by the Labor Management Relations Act, 1947, 61 Stat. 144 (1947), 29 U.S.C. § 159(c)(5), quoted in its pertinent context in the margin.[1]

The Board's policy for determining appropriate bargaining units of debit insurance agents has not been consistent over the years. In Metropolitan Life Ins. Co., 56 NLRB 1635 (1944), the Board announced that, departing from its previous policy, it would in the future, in the absence of unusual circumstances, avoid setting up units of debit insurance agents smaller than state-wide in scope. It said:

> "Based upon the extent of organization among employees of an employer, we have frequently found appropriate for bargaining purposes small groups of employees with a provision for revision of a unit upon a later showing of broader organizations. We believe, however, that the principle upon which we have set up such units is not controlling in the instant case. Organization among insurance agents is comparatively recent, but is steadily growing. The tendency of such organization is toward State-

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1 Sec. 9.

"(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof:

"(c) (5) In determining whether a unit is appropriate for the purposes specified in subsection (b) the extent to which the employees have organized shall not be controlling."

wide units. . . . Thus, the rapid growth of union organization among insurance agents makes it clearly appear that provisional units less than State-wide in scope are, under ordinary circumstances, unnecessary to make collective bargaining reasonably possible for them if they desire it. Accordingly, we are of the opinion that, in the absences of unusual circumstances, the practice of setting up units for insurance agents smaller that [sic] State-wide in scope should be avoided. In the instant case, since the . . . [unions] are all actively engaged in a broad organizational program in Ohio, and since it may reasonably be anticipated that one of these organizations may in the near future extend its membership to State-wide proportions, we are of the opinion that it will not effectuate the policies of the Act to set up city-wide units for employees of the Company in Ohio at this time." Id. at 1639-1640.

In 1961 a majority of the Board in Quaker City Life Ins. Co., 134 NLRB 960, changed the policy the Board had established in the Metropolitan Life Ins. Co. case in 1944 by determining that the debit insurance agents of Quaker City's one district office in Alexandria, Virginia, constituted an appropriate bargaining unit. The majority in the Quaker City case quoted from the language quoted above from the Metropolitan Life case and said:

> "Clearly this language of the Metropolitan Life case indicates that the rule was adopted solely in anticipation of broader organization on a companywide or statewide basis, which at that time seemed imminent. As a practical matter, however, such statewide or companywide organization has not materialized, and the result of the rule has been to ar-

rest the organizational development of insurance agents to an extent certainly never contemplated by the Act, or for that matter, by the Board that decided the Metropolitan Life case. There is no longer any rational basis for applying different rules of organization to the insurance industry than are applied to other industries. The rule was adopted for the purpose of permitting organization on a statewide or employerwide basis, which did not develop as anticipated. Contrary to our dissenting colleagues, we regard this as a valid reason for changing the rule. Obviously, when the purpose for which a rule has been established fails, the rule should also fail. This is especially so with respect to a rule which unfairly prejudices the collective-bargaining rights of employees. Accordingly, in the future, the Board's policy will be not to preclude the organization of insurance agents into units of less than employerwide or statewide scope, and we shall apply our normal unit principles to the cases as they arise. In the instant case, upon the record as a whole, and especially in view of the autonomous day-to-day operation of the district office here, the over-all immediate supervision by the district manager, the lack of contact or interchange among employees of the various district offices, and the absence of any administrative subdivision between the home office and the district office, we find the district office unit to be appropriate." Quaker City Life Ins. Co., 134 NLRB 960, 962 (1961)

The two dissenting members of the Board said that they could see "no valid reason for departing from the Metropolitan Life rule which the Board adopted in 1944." Id.

The United States Court of Appeals for the Fourth Circuit, Judge Boreman dissenting, enforced an order of the Board requiring Quaker City Life Insurance Company to bargain collectively with the same union involved herein as the bargaining representative of the unit certified by the Board in its underlying representation proceeding. NLRB v. Quaker City Life Insurance Company, 319 F.2d 690 (C.A. 4, 1963), enforcing 138 NLRB 61 (1962).

In subsequent cases a majority of the Board, with the same two members dissenting, certified as appropriate units consisting of nine of Metropolitan's district offices in the Cleveland, Ohio, metropolitan area (six offices in the City and three suburban offices eight or nine miles distant), Metropolitan Life Ins. Co., 138 NLRB 512 (1962), [unfair labor practice decision, 141 NLRB No. 96 (1963)] on appeal to Sixth Circuit, Case No. 15366; two of Metropolitan's three district offices in Delaware, Metropolitan Life Ins. Co., 138 NLRB 565 (1962), [unfair labor practice decision, 141 NLRB No. 37 (1963)] on appeal to Third Circuit, Case No. 14390; Metropolitan's single district office in Sioux City, Iowa, together with two detached offices under its administrative control in Fargo, North Dakota, and Sioux Falls, South Dakota, 284 and 120 miles distant, respectively, from Sioux City, Metropolitan Life Ins. Co., 138 NLRB 734 (1962); and all of Metropolitan's district offices within the political limits of the City of Chicago, thereby excluding suburban offices even though six of the thirty-three city district offices had territories extending beyond the city limits and three of the fourteen suburban offices had territories extending into the city. Metropolitan Life Ins. Co., 144 NLRB No. 15 (1963). In Equitable Life Ins. Co., 138 NLRB 529 (1962), the Board de-

termined appropriate a unit consisting of two district offices in Cleveland, Ohio, with a detached office in Lorain, Ohio, 28 miles away. And in this case the Board majority relying on prior decisions determined that one district office out of eight in a small densely populated state constituted an appropriate bargaining unit. The two dissenting members of the Board merely referred to their dissents in the Quaker City Life Ins. Co. case and in others in which they had not only reiterated that they saw no reason to depart from the policy established in the Metropolitan Life case of 1944, but had said that it appeared to them that the majority's unit determination was based upon the union's extent of organization of the debit agents involved.

We are very well aware that § 9(b) of the Act confers such broad discretion on the Board that a unit determination by it "if not final, is rarely to be disturbed." *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 491 (1947); *International Typographical Union Local 38 v. NLRB*, 278 F. 2d 10 (C.A. 1, 1960), aff'd in part, rev'd in part, 365 U.S. 705 (1961). But we would be remiss in our duty as an enforcing court should we overlook or ignore an evasion by the Board of the command laid upon it by § 9(c) (5), supra.

We are seriously handicapped in this case by the Board's failure to articulate specific reasons for its unit determination. It merely said in a footnote to its decision and direction of election:

> "The Employer has eight district offices and two detached offices in Rhode Island, and has only one district office in Woonsocket. The nearest district office is located 12 miles away in Pawtucket. In the prior proceeding in Case No. 4-RC-4865, based

on the same record incorporated by reference herein, we found that each of Employer's individual offices was in effect a separate administrative entity through which the Employer conducted its business operations, and therefore was inherently appropriate for purposes of collective bargaining. See Metropolitan Life Insurance Company, 138 NLRB No 73.[2]

Applying the tests set forth therein, we find that, since there is no recent history of collective bargaining, no union seeking a larger unit, and the district office sought is located in a separate and distinct geographical area, the employees located at the Woonsocket district office constitute an appropriate unit. See also Metropolitan Life Insurance Company, 136 NLRB No. 87."[3]

Not only do the cases cited by the Board majority not directly support its decision but also the criterion of location in a separate and distinct geographical area is not a criterion consistently applied by the Board as its decisions in Metropolitan's Cleveland and Chicago cases cited herein above clearly demonstrate.

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2 This is Case No. 4-RC-4865 reported 138 NLRB 565 (1962) in which the Board majority determined that two of Metropolitan's three district offices in Delaware constituted an appropriate bargaining unit.

3 This is a mis-citation. No. 87 is reported 138 NLRB 734 and is the decision in which the Board majority determined that Metropolitan's single district office in Sioux City, Iowa, together with its two detached offices in Fargo, North Dakota, and Sioux Falls, South Dakota, constituted an appropriate bargaining unit.

In the Chicago case the Board majority said:

"While 6 of the employer's 33 offices in the city of Chicago have territories extending beyond the city limits, and 3 of the 14 suburban offices have territories extending into the city, we do not regard this factor as undermining the appropriateness of a unit confined to the city because the territorial boundaries of district offices may be subject to frequent change. Because of this, the Board has relied not upon territorial boundaries but upon the physical location of the individual offices as the yardstick in determining the geographic appropriateness of the unit." Metropolitan Life Ins. Co., 144 NLRB No. 15 (1963).[4]

At first blush there is a certain plausibility to this reasoning despite doubts that city boundaries provide a more satisfactory basis for determining a separate and distinct geographical area than do the business-prescribed areas delegated to each company office or the metropolitan area which has developed through natural growth. Plausibility fades, however, upon consideration of Metropolitan's Cleveland case wherein the Board majority had previously decided that the Cleveland metropolitan area constituted an appropriate unit and certified a combination of six offices in the city and three in the suburbs. Metropolitan Life Ins. Co., 138 NLRB 512 (1962). Why there should be a community of interest among Metropolitan's agents working from

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4 As the dissenting members said: "If the appropriateness of insurance agents' units is to be determined by geographic considerations, we think it would be more reasonable to be guided by the metropolitan, or natural, confines of a geographic area, rather than the political limits of a city which are artificial and may be arbitrarily drawn . . ." Id.

both city and suburban offices in Cleveland but no community of interest among its agents working in both city and suburban offices in Chicago is not explained by the Board majority and is beyond our comprehension.[5]

The Board majority in this case did not discuss what weight, if any, it gave to the factor of extent of union organization. Nor indeed has the majority done so in any of its decisions since Quaker City.[6]

Looking at its actions, however, we have not found a single instance since Quaker City wherein the majority of the Board refused the debit insurance agent unit petitioned for by the Union. We would not consider this fact alone decisive for we would hesitate to assume that the Board was subservient to the Union.

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5 The Regional Director apparently had the same difficulty for he concluded that it would be improper to limit the unit to offices located within the city limits of Chicago because such a unit would include certain areas in the suburbs and exclude certain other areas in the city. Therefore he directed an election by the employees in all of Metropolitan's offices in the greater Chicago area. Metropolitan Life Ins. Co., 144 NLRB No. 15 (1963).

6 Judge Boreman in his dissent in that case at page 696 found more than a hint that extent of union organization was again dominant in the Board's thinking. He wrote: "Indeed . . . the Board in stating the rationale of its determination to reverse the policy decision in Metropolitan, clearly indicates that its newly adopted policy is, in reality, based upon the extent of organization factor when it now says that the 'language of the Metropolitan Life case indicates that the rule was adopted solely in anticipation of broader organization on a company or state-wide basis, which at that time appeared imminent,' but that 'as a practical matter, however, such state or company-wide organization has not materialized.'"

Yet we believe this fact is entitled to considerable weight in the light of the testimony of the Union's vice-president in Metropolitan's Cleveland case, supra, which was incorporated by stipulation in the record in the instant case, that if the Union did not succeed in organizing on a broader basis it would as a matter of policy petition for a unit "on a district basis." Indeed it is apparent that the Union followed this policy in the present case for in May and June 1962 it had engaged in organizational activities among agents attached to all of the Company's 8 district offices and 2 detached offices in Rhode Island, and it was only after lack of success in its state-wide attempt that it sought and received the Board's acceptance of the single district office in Woonsocket.

In short, the Union naturally wants units in which it can win elections and on the basis of the Board majority's actions, which speak more clearly than its words, it seems to us evident that in this case the Board majority in keeping with its apparent practice in recent years has given the Union the unit it wants. In the absence of any statement by the Board majority of any other rational basis for its varying unit determinations, we can only conclude that the two member Board minority is correct in its charge that the majority has indeed reverted to its pre-1944 policy of regarding the extent of union organization as controlling in violation of § 9(c)(5) of the Act.

A decree will be entered setting the Board's order aside and denying the Board's cross-petition for enforcement.

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 1121

WESTERN & SOUTHERN LIFE INSURANCE COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

Section 9(c)(5) of the National Labor Relations Act provides that, in determining whether a unit is appropriate for collective bargaining, "the extent to which the employees have organized shall not be controlling." In a consolidated proceeding, the National Labor Relations Board found that two separate units —one consisting of the Company's district office in McKeesport, Pennsylvania and the other of its district office in Wilkinsburg, Pennsylvania—were ap-

propriate for collective bargaining. 138 NLRB 588. The question presented is whether the Board's selection of these units, concededly proper on the basis of the reasons given by the agency, may be held to have been controlled by the extent to which the employees have organized, in violation of Section 9(c)(5), because the Board, in other cases involving employers in the insurance industry, consistently approved the unit sought by the union.

The court below answered this question in the negative. Its decision is in accord with its decision in a companion case and with decisions of the Fourth and Sixth Circuits in other cases involving the same legal issue. *Metropolitan Life Insurance Co.* v. *National Labor Relations Board*, 328 F. 2d 820 (C.A. 3), petition for certiorari filed, No. 982, this Term; *National Labor Relations Board* v. *Quaker City Life Insurance Co.*, 319 F. 2d 690 (C.A. 4); *Metropolitan Life Insurance Co.* v. *National Labor Relations Board* (C.A. 6), No. 15366, decided April 11, 1964. However, the decision of the court below is in conflict with the decision of the First Circuit in *Metropolitan Life Insurance Co.* v. *National Labor Relations Board*, 327 F. 2d 906.

The government believes that this conflict warrants resolution by this Court, and accordingly has filed a petition for certiorari to review the First Circuit decision, No. 1128, this Term. Moreover, Metropolitan has filed a petition for certiorari to review the decision of the court below in *Metropolitan Life Insurance Co.* v. *National Labor Relations Board*, 328 F. 2d 820, No. 982, this Term, and the government has

stated that it does not oppose the grant of that petition if the petition in No. 1128 is also granted. The instant case presents the same issue as the two *Metropolitan* cases in a nearly identical factual setting, as the court below recognized by treating its decision in *Metropolitan* as dispositive of the issues presented here (Pet. 18). In these circumstances, we suggest that, if the Court grants the petitions in Nos. 982 and 1128, it should hold the present petition on the docket pending the decisions in those cases, and then dispose of it in accordance therewith.

Respectfully submitted,

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